Original

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Policies and Rules Concerning Children's Television Programming	)	MM Docket No. 93-48
	)	
Revision of Programming Policies for Television Broadcast Stations	)	

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REPLY COMMENTS OF HENRY GELLER

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SUMMARY

The explicit language and legislative history of the Children's Television Act (CTA) make clear that the Commission cannot simply monitor the industry's effort to comply but rather must examine the showing of every television station at renewal to determine whether there has been compliance with the CTA. Similarly, the Act and the legislative history rule out an approach that requires the broadcast of a specified amount of core programming for children. There must be an examination of the overall record of the station to meet the CTA.

As a matter of sound policy, the Commission should give its renewal staff guidance as to which applications can be routinely granted and which require examination of the overall record. There should therefore be a processing guideline directed to core programming.

Such a processing guideline raises no constitutional question. It is ludicrous to argue that the FCC can examine the licensee's CTA showings at renewal but that if it gives its renewal staff some guidance as to which are to be routinely granted and which are to be examined in depth, that violates the First Amendment.

The optimum course to be pursued would involve the commercial segment funding the non-commercial segment to present additional core programming. Such a course is purely voluntary. The industry has shown some interest in this approach, as has the noncommercial television sector. The Commission should do all it can to promote its consideration by the commercial sector.

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Henry Geller submits these reply comments directed to three points -- what the 1990 Children's Television Act (CTA) requires, the constitutional issues that have been raised, and the optimum course that the Commission should promote.

I. <u>There is one course that the Commission must follow -- serious scrutiny of every TV renewal application for compliance with the CTA, and that in turn leads to a processing guideline</u>.

There have been a number of confused positions and statements concerning implementation of the CTA. On the one hand, claims are made by the broadcasters that surveys now show substantial efforts to comply with the CTA and thus the FCC need take no action; at most, the monitoring option set out in the Further Notice (Option 1, par. 7) is all that is called for. On the other hand, CTA proponents call for a quantitative standard as to core programming[1] that broadcasters would be required to meet (but as is allowed with all rules, could seek a waiver with

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[1] Such programming is specifically designed to serve the educational and informational needs of children, and should be defined along the lines of the Further Notice, with the revision held open in the Notice that the time period should commence at 7 a.m. rather than 6 a.m. See Comments of CME, filed October 16, 1995, at 28-29.

a specific showing of the basis therefor) (Option 3, par. 7, of the Further Notice). Neither position is consistent with the CTA. The Act gives the broadcaster considerable discretion as to compliance with the CTA, ruling out the latter option, but requires the FCC to make a determination as to every renewal applicant whether there has been compliance with the CTA, thus also ruling out the "just monitor" approach.

The CTA emerged in the context of television deregulation in the decade of the 1980's. Under that process, the Commission decided that broadcasters were to be given great discretion to meet their public service obligation, now defined as community-issue oriented programming; that the public would be relied upon to bring to the Commission's attention at renewal those broadcast operations not meeting their public interest obligation; and that therefore the broadcaster need only file a postcard stating that it had placed the requisite showing as to community-issue oriented programs in its public file.[2]

Congress concluded that children were not receiving reasonable public service under this relaxed regime, and therefore enacted the CTA. It directed the Commission "...in its review of any application for renewal of a television broadcast license, [to] consider the extent to which the licensee ... has served the educational and informational needs of children through the licensee's overall programming, including programming

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[2] See Television Deregulation, 96 FCC2d 1076 (1984); reconsid., 104 FCC2d 358 (1986).

specifically designed to serve such needs." In light of this clear statutory language, the Commission must review every television renewal application to determine compliance with the CTA. It cannot simply rely on the public to come forward (although the public of course can still participate by filing complaints or petitions to deny if it chooses to do so). It cannot say that it is going to monitor the industry's overall efforts and not focus on each licensee's obligation under the CTA.[3]

While the statutory language is crystal clear, the legislative history further drives home this point. Thus, the Senate Report states (S. Rept. No. 101-227, 101st Cong., 1st Sess. (1990), at 22-23):

> The Committee notes that an essential element of this legislation is that broadcasters, as public trustee, report to the FCC their efforts in this respect... Broadcasters ... must send their children television lists to the FCC at the time the FCC is considering licenses of renewal. The Committee recognizes that this last requirement distinguishes this material from all other community-issue oriented programming. That is the Committee's explicit intent.

As to Option 3, a quantitative standard as to core programming that must be met (with waiver possible), the Act and the legislative history are again clear. The Act directs the

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[3] It is clearly desirable for the Commission to monitor overall industry efforts as to (i) community issue-oriented programming and (ii) specifically compliance with the CTA (see CME Comments, at 40-44). The difference between (i) and (ii) is that as to (i) the Commission can rely on the monitoring (which unfortunately it has never done) and the public, while as to (ii) it must examine every renewal application and cannot rely on monitoring or the public.

Commission, in determining at renewal whether the broadcast has met the CTA obligation, to look to the licensee's overall programming and to programming specifically designed to inform or educate. The Act also provides that the Commission may consider special non-broadcast efforts to enhance the efficacy of the programming and any special efforts to produce or support specifically designed educational/informational programming broadcast by another station in the area.

The legislative history further illumines this point. Thus, the Committee noted that "general purpose programming can have an informative and educational impact," but made clear that broadcasters could not meet their obligation simply "by putting on adult oriented shows that children might also watch": "Under the reported bill, the FCC can still consider general audience programming, but it also must consider whether the licensee has provided educational and informational programming that was produced specifically for pre-school and school-aged chidlren[;] the appropriate mix is left to the discretion of the broadcaster."[4]

The legislative approach is thus clear: The licensee must present programming specifically designed to educate and inform, but the Commission is to take into account the overall efforts of the station, such as general purpose programming shown to have educational or informational impact, special non-broadcast efforts or special efforts with other stations such as the public

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[4] S. Rept. No. 101-227, supra, at 22-23.

television system, short segments, PSAs, etc. A quantitative requirement of x hours of core programming does not fit this statutory scheme, since the appropriateness of the "mix" under the CTA must be determined upon the particular showing. Stated differently, a showing of y hours of core programming may be sufficient in light of strong other efforts and insufficient where such other efforts are weak.

It follows that the Commission must examine the CTA showing in every renewal application. It can simply direct its renewal staff to do so and to bring to its attention inadequate showings. But as the Commission must know, this is a "cop-out." It gives no guidance to the staff as to what applications may be routinely granted, and what require thorough digging and analysis, and possibly referral to the full Commission. This is also the poorest possible managerial approach in light of the Commission's difficult and strained resource problems, as pointed up by recent events.

So in this important area, the renewal staff should have some guideline as to what applications can be routinely granted, and which ones require deeper scrutiny, evaluation and possible further process. Clearly, the key guidance factor is core programming. All licensees must supply such programming (or facilitate its presentation elsewhere). The other pertinent factors can all vary widely in their presence or pertinence to a particular case. It follows that a processing guideline should focus on that factor, i.e., that x number of hours of core

programming was presented in time periods where a substantial number of children can view the programming. The definition of the time period and the number of hours is a matter for Commission judgment, but since these criteria assure renewal, they should be reasonable and substantial figures.[5]

If the processing guideline is met, the staff routinely grants the renewal application. If it is not, that does not mean that renewal is foreclosed. The staff must then turn to the other factors, and a judgment must be made, at times involving the full Commission, whether a renewal is called for, or some different course of action is indicated.[6]

In the attached appendix at pp. 9-11,[7] I quote extensively from Chairman Dean Burch statements why it is such poor policy to

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[5] I concur with the recommendations set out in the CME Comments (at 24-29) in these respects and will not repeat the CME arguments here.

[6] There has been much comment on the Report language that "[t]he Committee does not intend that the FCC interpret this section as requiring or mandating a quantification standard governing the amount of children's educational and informational programming that a broadcast licensee must air to have its license renewed pursuant to this section..." (H, Rept. No. 385, 101st Cong., 1st Sess/ 17 (1989). See, e.g., CME Comments, at 37-40. However construed, it certainly does not bar a processing guideline along the lines indicated above, since under that approach, there is no requirement of set amount of programming, core or otherwise, but rather renewal will always be determined upon the applicant's overall record in this area.

[7] The appendix is a document, "Constitutionality of Processing Guidelines for Children's TV," prepared by me and submitted, in essence, in the prior comments of CME, dated July 15, 1994, in this docket. I have attached it here so that in dealing with the NAB's constitutional arguments (Point II, infra), the document may be more conveniently referenced. As noted, it is also pertinent to the above policy discussion.

proceed without any guidance to the staff as to what is an inadequate showing for renewal purposes. It is also unfair to the public and to the broadcasters who then are not given notice at the earliest time of what constitutes a "safe haven" for renewal and thus makes renewal certain and absolutely predictable, rather than a matter for evaluation and judgment. See pp. 10-11, Appendix.

I say at the earliest time because even if the Commission fails now to give any guidance to its renewal staff, a de facto processing guideline will emerge. The NAB may hope that the processing pattern that existed immediately after the CTA went into effect in October, 1991 will be reinstituted in the absence of a guideline. Under that pattern, the FCC renewed licenses even though the station's showing was clearly inadequate.[8]

However, there has been a seachange in light of the FCC's recnet notices and hearings. Public interest groups are now alerted to the need to file petitions to deny when inadequate

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[8] Thus, in 1993 the Commission renewed the license of the Disney Company, licensee of VHF station KCAL-TV, Los Angeles, when its record was dismal. For the first 12 months after CTA took effect (Oct. 1991-Sept. 1992), Disney aired a single half-hour program, "Smoggies," from 5:30 a.m. to 6 a.m. During the next year, KCAL's core programming showing consisted of nine months of one-half program ("Captain Planet") per week aired on Saturday morning, 6 a.m. to 6:30 a.m., and three one-half hour showings of "Bill Nye." Disney clearly was sloughing its responsibility under the CTA, with the amount of core programming quite small and presented at an early hour when the child audience is quite small. Its effort was to maximize profit, not serve children. As shown by the CME petition to deny against the Westinghouse/CBS transfer (at pp. 17-21), the Commission also renewed Westinghouse stations during this period with most inadequate showings.

showings are now made to the Commission. Over time, with the filing of such petitions, a processing standard will emerge. If the Commission grants the application despite the opposition, that will constitute the processing standard. If the applicant has to upgrade in order to obtain renewal, that will indicate the guideline. Communications lawyers are now confused as to what to advise their broadcast clients, but over time the pattern will emerge, and their advice letters will be sent to all clients. The process may be messy and unfair to the particular applicant or applicants that are made the "guinea pigs" but as a practical matter, it will work to some conclusion.

Indeed, a single Commissioner may force the process, if the Commission fails to give any processing guidance to its renewal staff. Several Commissioners are now intensely interested in the implementation of the CTA. They could advise the renewal staff to notify their offices of any application showing less than x amount of core programming, so that their offices could examine the other factors and reach a judgment as to whether to go along with renewal or urge against renewal, including a dissent thereto.[9] So once again, over time, a processing guideline will emerge.

In short, the Commission cannot escape the problem of sensibly processing renewal applications with respect to CTA

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[9] Individual Commissioners have interested themselves in the renewal process in the past. See, e.g., Renewal of Standard Broadcast & Television Licenses for Okla., Kan. and Neb., 14 FCC2d 1, 9 (1968) (Johnson and Cox, Comm'rs, dissenting).

showings. It should therefore face up to its problem now and adopt a reasonable processing guideline that faithfully carries out the purposes of Congress in enacting the CTA, permitting speedy renewal of licensees meeting the guidelines and calling for in-depth consideration of the overall record of those that do not.

II. There is no significant constitutional issue before the Commission.

The NAB raises constitutional issues, and the FCC's Further Notice also deals with such issues. But there is no significant constitutional issue before the Commission.

As stated, I have attached a memorandum setting forth my views that the CTA is constitutional in light of the Red Lion holding, based on scarcity leading to the public trustee scheme. I will not repeat those arguments here. Broadcasters can, of course, seek judicial review of the CTA, and argue that Red LIon and the public trustee scheme should be overturned.[10] They have

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[10] Even were that to occur, the Act could well be held to be constitutional under established First Amendment jurisprudence. For while the law is clearly content based, there is a compelling governmental interest, as found by Congress in light of the importance of educational programming for children who watch so much television, and the act would be narrowly tailored to effect that interest. See CME Comments, at 33 (quoting the House Report that it is "difficult to imagine a more compelling governmental interest that promoting the welfare of children who watch so much television and rely upon it for much of the information they receive"). See also H. Geller, Turner Broadcasting, the First Amendment, and the New Electronic Delivery Systems, 95 Mich. Tel. Tech. L. Rev. 1 (1995); M.E. Price & D.W. Hawthorne, Saving Public Television: The Remand of Turner Broadcasting and the Future of Cable Regulation, 17 Hastings Comm. & Ent. L. J. 65, 76, 84-85 (1994).

never done so, and the reason why is clear: If Red Lion were overturned, the broadcasters would be in the same position as a PCS or similar licensee and would then be subjected to spectrum usage fees or auctions, including for the new ATV channels. Their claim that such auction or fees are inapplicable to them is based squarely on their public service obligation -- to put profits second and public service first.[11] For broadcasters, it is clear that the bottom line is not their view of the First Amendment, but rather the bottom line is the bottom line of the finance sheet.

In any event, the validity of the CTA is not before the Commission. It is well established that the Commission cannot invalidate an act of Congress but rather must follow the clear Congressional direction in the CTA. See Appendix, at 1. Nor is the issue of the constitutionality of a mandatory requirement of core programming before the Commission. See supra, at 3-4. The sole issue is whether it is constitutional for the Commission to adopt a processing guideline for its staff so that the staff knows which applications can be routinely granted and which require examination of all CTA efforts.

But it cannot be seriously argued that such a guideline is unconstitutional. See Appendix, at 10-12. Indeed, the NAB argument, and the supporting Smolla Statement, find themselves in a ludicrous position. They concede that it is permissible constitutionally for the FCC to follow the CTA and examine

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[11] See Appendix, at 5-6.

renewal applications for compliance with the CTA.[12] This necessarily involves the Commission in examination of the programs (and possibly non-broadcast efforts) put forth to show compliance. The Commission must determine whether such programs represent core programming (a CTA requirement) or contribute to educational/informational needs of children (another CTA requirement). It must determine whether they were presented when children could reasonably be expected to be in the audience. Since the Commission cannot engage in quality judgments, it must then make a judgment as to whether quantitatively the effort is sufficient. Thus, to use a flagrant example, the FCC could find that an applicant that presented just one-half hour of children's programming at 3 a.m. had not complied and could not be renewed.

The NAB and Professor Smolla nowhere explain why it is constitutional for the FCC to examine CTA renewal showings and reach judgments thereon but suddenly becomes unconstitutional for the Commission to have a processing guideline for its staff. That guideline is not a substantive requirement.[13] Under it, the

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[12] Thus, the NAB Comments, at 33, state that the FCC can "...review stations' programming efforts at renewal time." The Smolla Statement (at 39) asserts that the FCC is not "powerless" because the CTA "...does impose obligations on broadcasters, and the Commission is directed, in license renewal proceedings, to treat those obligations seriously." But the Commission can do that only by examining the overall efforts of the licensee, including of course its programming showing.

[13] Significantly, it would be codified in Part 0 as a delegation to the staff to routinely grant some applications and to more thoroughly examine others or perhaps bring some to the Commission. Cf. the FCC's 1973 processing guidelines, 47 C.F.R. Sec. 0.281; Amendment of Part of the Commission's Rules -- Commission Organization -- With Respect to Delegation of

Commission would be making the same judgments as those described above. The final decision might well be renewal in light of the overall effort; if it were a denial, the applicant could certainly seek review on the ground that the Commission action is arbitrary or inconsistent with the CTA (or even that it is unconstitutional -- see above discussion). But it would be the final action and only the final action that could and should be the basis of any claim of injury -- not the processing guideline that simply determines the process leading to some end result -- routine renewal or renewal only after in-depth examination or renewal with conditions or no renewal.

III. The Commission should make every effort to promote the optimum course of action -- voluntary contributions by the commercial sector to the non-commercial sector.

I have long urged that the present regulatory scheme is ineffectual and should be replaced.[14] While broad reform is of course far beyond the scope of this proceeding or the Commission's ambit, the Commission could, under the explicit provisions of the CTA, encourage elements of reform in this area.

Specifically, the CTA affords the licensee credit at renewal if it has facilitated the presentation of core programming over other facilities in the area. In my view, facilitating such presentation over the public television system would markedly

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Authority to the Chief, Broadcast Bureau, 43 FCC2d 638 (1973).

[14] See H. Geller, The Annenberg Washington Program, "1995-2005: Regulatory Reform for the Principal Electronic Media," 9-25 (1994).

serve the public interest for the reasons stated in the 1994 article cited in n. 14, at 17-21. It would relieve all First Amendment strains and allow the commercial broadcasters to program as they wish, focussing, for example, on news or public affairs programming on Saturday or Sunday mornings rather than children's fare. It would assure that public licensees deeply and genuinely committed to presenting educational and informational programming for children have the resources necessary to do so. It would, in short, be a structure working for the effectuation of public interest goals, rather than the present behavioral regulatory scheme which has engendered much controversy and faced so many difficulties.

I stress that proceeding in this fashion would be wholly voluntary. If the commercial television industry had no interest in this endeavor, that would be the end of the matter. But news reports indicate that fairly recently, one network, NBC, did have an interest in pursuing this route.[15] APTS has submitted comments in this proceeding urging the desirability of so proceeding. The Commission should make every effort to see if there is interest and to promote such interest. It could do so, for example, by all the Commissioners meeting with representatives of the four major networks (or possibly the NAB or INTV although trade associations appear to have great difficulty taking practical or definitive actions). If there were interest, there could then be focus on the implementing facets and if that process were brought

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[15] The Washington Post, D5, October 31, 1995.

to a successful conclusion, public comment could be afforded. The central point now is for the Commission to act as a catalyst for voluntary actions that by far constitute the optimum way to proceed to achieve a win-win situation that would best serve the interests of children and perhaps many sectors of the commercial television industry. See op. cited in n.14, at 21-24.

CONCLUSION

This a defining moment for the Commission and the commercial television industry. The industry cannot assert, as it does, its claims of strong focus on public service in order to ward off auction or usage fees, and then try to weasel out of accountability for the most important area of public service -- children. The Commission cannot say that it is discharging the single most important responsibility imposed upon it by the Congress in the broadcast television area if it tries to slough that duty. It must follow and faithfully implement the statute. And it should try to do so in a way that optimanlly serves the public interest (Point III, above).

Respectfully submitted,

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November 15, 1995

Constitutionality of Processing Guideline for Childrens' TV

Henry Geller

This memorandum discusses the constitutionality of Commission action to prescribe a quantitative processing guideline as to core educational/informational television programming in dealing with renewal applications. The memorandum sets out why this is the critical issue before the Commission and then concludes that such a guideline is, without the slightest doubt, constitutional. Before treating these two points, the constitutionality of the public trustee scheme will be briefly discussed.

1. The constitutionality of the public trustee scheme.

There have been recent articles questioning the constitutionality of the public trustee scheme in connection with this proceeding.[1] The short answer is, of course, that the agency "cannot invalidate an act of Congress", and must follow the Congressional direction. See Johnson v. Robison, 415 U.S. 361, 368 (1974); Meredith Corp. v. FCC, 809 F.2d 863, 872 (D.C. Cir. 1987). In the Children's Television Act of 1990,[2] Congress has clearly directed the Commission, "...in its review of any application for renewal of a television broadcast license, [to] consider the extent to which the licensee ... has served the educational and informational needs of children through the

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[1] See, e.g., Broadcasting & Cable, June 27, 1994, at 18-19. In its recent opinion in Turner Broadcasting System, Inc. v. FCC, Case No. 93-44, issued June 27, 1994, the Court noted (Part II(A), n.5) that "...courts and commentators have criticized the scarcity rationale since its inception...[but] we have declined to question its continuing validity as support for our broadcast jurisprudence..."

[2] Public Law 101-437, 104 Stat. 997 (1990).

granted, and which ones require scrutiny, evaluation and possible further process.

Clearly, the key factor that must be met is that the licensee has presented programming specifically designed to serve the educational and informational needs of children (herein called core programming) (or has facilitated its presentation by public television). The other pertinent factors listed above can all vary widely in their application to a particular case. It follows that a processing guideline should focus on that factor, i.e., that x number of hours of such core programming for pre-school or school-aged (6-12) children was presented in time periods where such children normally can view the programming. The number of hours is a matter for Commission judgment, but since it assures renewal, it should be a substantial figure.

If the processing guideline is met, the staff routinely grants the renewal application. If it is not met -- if it is x minus 1 or some greater number, that does not mean that renewal is foreclosed. The staff must then turn to the other factors listed above, and a judgment must be made, at times involving the full Commission, whether a renewal is called for, or some different course of action is indicated.

Absent such a processing standard in a public delegation of authority to the staff, we would be back to the most unsatisfactory situation described by Chairman Dean Burch (address to the IRTS on Sept. 14, 1973):

> If I were to pose the question, what <u>are</u> the FCC's renewal policies and what are the controlling

licensee's overall programming, including programming specifically designed to serve such needs." The Commission must follow that clear direction.

In any event, the public trustee scheme is manifestly constitutional. Many more people want to broadcast than there are available frequencies, and the Government must choose one entity and -- to prevent engineering chaos -- enjoin all others from using the frequency. This scarcity -- based not on the number of outlets[3] or a comparison of broadcast outlets with other medio but on the number of those who seek broadcast frequencies compared to the number of frequencies available -- is the "unique characteristic" of radio that supports its regulatory scheme.[4] It is undisputed that this same scarcity -- many more people wanting to broadcast than there are available frequencies -- exists today.[5]

As the Court pointed out in Red Lion, supra, 395 U.S. at 390-91, "[r]ather than confer monopolies on a relatively small number of licensees, in a Nation of 200,000,000, the Government

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[3] The seminal Red Lion case (Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969)) was a radio case at a time when there were roughly 6900 radio stations; today there are roughly 11,000 radio stations. It cannot be seriously argued that the public trustee scheme is constitutional at 7000 but at 11,000 is not.

[4] NBC v. FCC, 319 U.S. 190, 226 (1943).

[5] There are no frequencies open in the large markets where the bulk of the population resides. If one were to open, there would be a plethora of applicants. See S. Rept. No. 100-34, on S.742, 100 Cong., 1st Sess., at 21-23 (1987); H. Rept. No. 100-108, 100th Cong., 1st Sess., at 13-18 (1987).

surely could have decreed that each frequency should be shared among all or some of those who wish to use, each being assigned a portion of the broadcast day or the broadcast week." The Government instead decided upon a public trustee licensing scheme. The broadcast applicant is a volunteer who pays no money for this scarce privilege. But it receives no property right in the frequency -- "no right to an unconditional monopoly of a scarce resource the Government has denied to others the right to use." Red Lion, id. at 391. Rather, to protect the First Amendment rights of these others, the broadcaster receives only a short term license and agrees to serve the public interest in its administration of the frequency -- to be a "fiduciary" for its community. Id. at 390. Thus, under this scheme, "it is the rights of the views and listeners, and not the broadcasters, which are paramount." Id.

The decisions of the Supreme Court to this effect are numerous.[6] Most significantly, this affirmance of the public trustee licensing scheme has continued in this decade. See Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 566-67 (1990). See also n.1., supra.

The validity of the public trustee licensing scheme means, in turn, that the licensee must render public service, and is accountable to the FCC for demonstrating that it has operated in

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[6] In addition to Red Lion and NBC, see, e.g., FCC v. League of Women Voters, 468 U.S. 364, 377, 381 (1984); CBS, Inc. v. FCC, 453 U.S. 367, 395, 397 (1981); FCC v. NCCB, 436 U.S. 775, 799 (1978); CBS v. DNC, 412 U.S. 94, 111 (1973).

the public interest. Of course this interferes with the editorial autonomy of the licensee: It cannot, for example, decide to present only pure entertainment fare in order to maximize its profit. On the other hand, the FCC cannot censor (Section 326 of the Act) or engage in subjective judgments such as quality determinations. The law thus represents a "delicately balanced" system, with the licensee being afforded great discretion in the sensitive programming area.[7]

It follows that as part of the public interest obligation of broadcasters, Congress can properly be concerned that children receive a reasonable amount of informational/instructional programming. Children are the bedrock upon which our society rests (Prince v. Massachusetts, 321 U.S. 158, 168 (1943)), and they concededly watch a great deal of television. Broadcasters must therefore render public service to this uniquely important segment. See the findings in the 1990 Act and its legislative history;[8] Children's Television Report, 50 FCC2d 1, 5-6 (1974).

Concededly, whenever programming categories are used -- whether they are "local", "informational", "non-entertainment", "community-issue oriented", "personal attack", or, as here, "specifically designed to [educate or inform children]",

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[7] See CBS, Inc. v. FCC, supra, 412 U.S. at 102, 110 ("...Congress intended to permit private broadcasting to develop with the widest journalistic freedom consistent with its public obligations").

[8] H. Rept. No. 101-385, 101st Cong., 1st Sess. (1990); S. Rept. No. 101-227, 101st Cong., 1st Sess. (1990).

difficult definitional problems can arise, particularly at the margins. See NAITPD v. FCC, 516 F.2d 526, 539-41 (2d Cir. 1975). But this does not mean that Congress and the FCC cannot properly focus on appropriate programming categories of public service, as both have long done. Were it not possible to do so, the public service obligation would become a nullity -- a vague command entirely unenforceable. The categories must be reasonably related to the public interest standard, and must be reasonably implemented, taking into account the wide programming discretion afforded the licensee.

Thus, if public service has any meaning, it must encompass such service to children, and therefore the programming classification, "specifically designed to serve the educational and informational needs of children," does not violate the First Amendment. See Red Lion, supra; NAITPD v. FCC, supra, 516 F.2d at 537 ("Nor does the program category method of reconciliation of the public interest create the risk of an enlargement of government control over the content of broadcast discussion of public issues"). It simply brings objective focus to the public interest obligation, without involving the agency in the quality of the particular informational/educational program presented.

As a final incidental point, the broadcasters themselves acknowledge and accept the public trustee scheme. Thus, the NAB has vigorously opposed the spectrum usage fee put forward by OMB on the ground that they must render public service, and that such a fee is appropriate only if the public service obligation is

withdrawn. See Broadcasting & Cable Mag., June 6, 1994, at 50.

2. The issue before the FCC is the constitutionaly of a processsing guideline -- not a mandatory requirement for a specified amount of educational/informational programming.

In the past there have been a number of bills that would have required television broadcasters to present a specified number of hours of educational/informational programming for children during the week. In my view, such an approach is both constitutional and good policy. But that is not the approach of the 1990 Act.

Rather, the Act, by its terms, directs the Commission, in determining at renewal whether the broadcaster has served the educational needs of children, to look to the licensee's overall programming and to programming specifically designed to inform or educate. The Act also states that the Commission may consider special non-broadcast efforts to enhance the efficacy of the programming and any special efforts to produce or support specifically designed educational/informational programming broadcast by another station in the area (in all likelihood, the public television station).

The legislative history further illumines this point. Thus, the Committee noted that "general purpose programming can have an informative and educational impact", but made clear that broadcasters could not meet their obligation simply "by putting on adult oriented shows that children might also watch": "Under

the reported bill, the FCC can still consider general audience programming, but it also must consider whether the licensee has provided educational and informational programming that was produced specifically for pre-school and school-aged children[;] the appropriate mix is left to the discretion of the broadcaster." It is also stated that the "Committee does not intend that the FCC interpret this section as requiring a quantification standard governing the amount of children's educational programming that a broadcast licensee must broadcast to have its license renewed pursuant to this ...legislation." S. Rept. No. 101-227, supra, at 22-23.

The legislative approach is thus clear: The licensee must present programming specifically designed to educate and inform, but the Commission is to take into account other efforts, such as general purpose programming shown to have educational or informational impact, special non-broadcast efforts or special efforts with the public television system. Further, as the recent hearing established, there can be consideration of other factors, such as the promotional efforts undertaken, special efforts with educators or special ascertainment to give heightened assurance that the program will be specifically designed and effective for informational purposes. See, e.g., Statements of Peggy Charren and Karen Jaffe in this proceeding.

3. The Commission should adopt a quantitative processing guideline for the core programming.

This area is different from all other programming areas.

Prior to the deregulation of radio in 1981 and television in 1984, the Commission received programming information in processing renewal applications. It accordingly adopted processing guidelines for its renewal staff that would distinguish applications that could be routinely granted and those requiring scrutiny by the Commission itself.[9] With deregulation, programming information was no longer supplied to the Commission but rather is maintained in the station's public files. The Commission depends upon the public to bring to its attention inadequate public service applications for renewal.

The 1990 Act markedly changed the process as to children's television programming (S. Rept. No. 101-227, supra, at 22-23):

> The Committee notes that an essential element of this legislation is that broadcasters, as public trustees, report to the FCC their efforts in this respect... Broadcasters...must send their children's television lists to the FCC at the time the FCC is considering licenses of renewal. The Committee recognizes that this last requirement distinguishes this material from all other community issue-oriented programming. That is the Committee's explicit intent.

It follows that while the public may still participate if it chooses to do so, the Commission has no choice: It must examine the showing and reach a determination as to whether the licensee has met its obligation to serve the educational needs of children. So in this important area, the renewal staff should have some guideline as to what applications can be routinely

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[9] See Delegation of Authority to the Chief, Broadcast Bureau, 43 FCC2d 648 (1973); 59 FCC2d 491 (1976).